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Nos. 81-2147 and 81-2188

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, *et al.*, *Petitioners*

v.

SAN CARLOS APACHE TRIBE OF ARIZONA, *et al.*, *Respondents*

STATE OF MONTANA, *et al.*, *Petitioners*,

v.

NORTHERN CHEYENNE TRIBE OF THE NORTHERN CHEYENNE INDIAN RESERVATION, *et al.*, *Respondents*

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF THE COLORADO RIVER WATER CONSERVATION DISTRICT AND THE SOUTHWESTERN WATER CONSERVATION DISTRICT IN SUPPORT OF PETITIONERS

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BRIEF AMICUS CURIAE ON BEHALF OF THE COLORADO RIVER WATER CONSERVATION DISTRICT AND THE SOUTHWESTERN WATER CONSERVATION DISTRICT[1] IN SUPPORT OF PETITIONERS

Predicated upon disclaimers in the State Constitutions of Arizona and Montana, the court below held that the decision of this Court in *Colorado River Water Conserva-*

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[1] Both Districts are political subdivisions of the State of Colorado and quasi municipal corporations within the meaning of Rule 36.5 of this Court's rules.

tion District, et al. v. *United States*, 424 U.S. 800 (1976),[2] allowing state court water adjudication proceedings to adjudicate the claimed reserved water rights of Indian tribes, was inapplicable.

It is respectfully submitted that such decisions are in error. It was the unanimous view of this Court in *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520 (1971),[3] and *United States* v. *District Court in and for Water Division No. 5*, 401 U.S. 527 (1971),[4] that Congress passed the McCarran Amendment, 43 U.S.C. 666, for the purpose of bringing *all* claims for the use of water from a stream system before one tribunal equipped to handle the same. Otherwise, piecemeal adjudications ending in decrees of little value would result.

The state constitutional disclaimers relied upon are generally not confined to Indian lands, but also relate to all "public" lands.[5] If the views urged in the Memorandum

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[2] Your *Amici* Districts in Colorado were among petitioners there. The involved Indian tribes were the Southern Ute and Ute Mountain Ute Tribes. There is no justification in the decisions below for compelling those tribes to accede to state court jurisdiction, and allow other tribes to escape such jurisdiction solely because the tribes litigating here feel there is something prejudicial in initial state court adjudications. *Amicus* Colorado River Water Conservation District was also a respondent in *Eagle*, *infra*, and *Water Division No. 5*, *infra*. Participation in those landmark decisions accounts for their interest here.

[3] "The whole community of claims is involved . . . ." (401 U.S. at 525).

[4] "The present suit, like the one in the Eagle County case, reaches all claims, perhaps month by month but inclusively in the totality;" (401 U.S. at 529).

[5] *See, e.g.*, the references to the Arizona and Montana constitutions in the Petitions for Certiorari. The Colorado Enabling Act (18 Stat. 474) by Sec. 4 requires the constitutional convention to adopt an

of the United States on certiorari prevail here, it will undoubtedly be asserted next that such disclaimer may be applied as to all Federal water rights whether reserved or appropriative.[6] The United States here continues to attempt avoidance of the thrice asserted view of this Court. If the United States is successful, the necessary and beneficial effect of McCarran, so apparent to this Court in *Eagle, supra, Water Division No. 5, supra,* and *Colorado River,*[7] *supra,* and upon which there has been such substantial reliance, will be lost.[8]

The disclaimers appear in such state constitutions as a condition imposed by Congress on admission to statehood. If such jurisdictional disclaimers are here applicable at all, the McCarran Amendment can be said to have waived the limitations insofar as general adjudications of rights to the use of water are concerned. The issue here is

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"ordinance irrevocable . . . that the people inhabiting said territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States . . . ." The Ordinance as adopted by the Convention is in identical language and may be found in General Laws, Colorado (1877) p. 82 and Proceedings of the Constitutional Convention, Colorado (1907) p. 233.

[6] The disclaimer assertion is nothing more than a veiled reiteration of the claim of the United States of ownership of all waters arising on public lands.

[7] "Thus, bearing in mind the ubiquitous nature of Indian water rights in the Southwest, it is clear that a construction of the [McCarran] Amendment excluding those rights from its coverage would enervate the Amendment's objective." (fn. omitted, 424 U.S. at 811).

[8] The footnote to the quotation in fn. 7 points out that to hold otherwise would obviously vitiate the decisions of this Court in *Eagle County* and *Water Division No. 5.*

not disclaimer by state constitution, but, rather, whether Congress intended by McCarran to provide for the adjudication of the "whole community of claims" in one court. As this Court has heretofore concluded, it is manifest Congress did so intend, as otherwise, the Amendment would have no meaning.[9]

The legislative history quoted in the Court's opinions in *Eagle* and in *Colorado River* leave this matter beyond doubt. In *Eagle* (401 U.S. at 525), Senate Report No. 755, 82d Cong., 1st Sess. was quoted as follows:

> S. 18 is not intended . . . to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.

And in *Colorado River* (424 U.S. at 810-11):

> In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and

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[9] The additional distinction asserted by the respondents to the effect the suits below were brought by the Tribes and not the United States is, in view of the ills sought to be cured by McCarran, specious.

equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts.

These *Amici* deplore the erosive effect of the decisions below on the orderly adjudication of rights to the use of water guaranteed by the previous decisions of this Court. They respectfully support reversal of the decisions below.

Respectfully submitted,

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